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Comptroller General
of the United States
Washington, D.C. 20548

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REDACTED VERSION*

# Decision

Matter of: ES, Incorporated

File: B-258911.2

Date: March 1, 1995

Janice Davis, Esq., McKenna & Cuneo, for the protester.
Douglas L. Patin, Esq., and Catherine R. Baumer, Esq., Spriggs & Hollingsworth, for CDM Group, Inc., an interested party.
Terrence J. Tychan, and Albert G. Deal, Department of Health and Human Services, for the agency.
Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that procuring agency improperly reopened negotiations is denied where it was not clear from the solicitation: (1) whether offerors were to propose costs for two tasks on a per year basis or a cumulative basis for the entire 5-year contract period, and (2) that a stated number of required trips in the solicitation applied to certain tasks only and that offerors were required to propose that specific number of trips for those tasks.

2. Where protest that contracting officer failed to follow applicable regulations in addressing a mistake in protester's offer is not filed within 10 working days after the contracting officer's allegedly improper action, protest is dismissed as untimely.

3. Protest that contracting officer improperly failed to permit protester to correct a mistake in its offer is denied where, because the mistake was not apparent from the face of the offer, in order to permit protester to correct the mistake, the contracting officer would have had to reopen negotiations and it was clearly not in the government's best interest to do so.

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*The decision issued on March 1, 1995, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions are indicated by "[deleted]."

DECISION

ES, Incorporated protests the award of a cost-plus-award-fee contract to The CDM Group, Inc. under request for proposals (RFP) No. CSAT-94-0003, issued by the Department of Health and Human Services (HHS) for technical assistance and other services for drug and alcohol treatment programs.

We deny the protest.

The Center for Substance Abuse Treatment has awarded numerous grants for the delivery of drug and alcohol addiction treatment services. The objective of the solicitation is to provide technical assistance to grantees, and other programs that receive referrals from or make referrals to the grantees, and to conduct workshops. The solicitation listed 18 tasks that the contractor would be required to perform. As relevant to this protest, tasks 3 through 8 involve the provision of technical assistance to alcohol and other drug abuse treatment programs, including the identification of consultants to provide technical assistance; task 13 requires the awardee to conduct pre-award site visits to evaluate and validate information provided in applications for future grant awards; and task 14 requires the awardee to provide a consultant for each grant target city for on-site consultation regarding the implementation of jail treatment programs.

The solicitation required offerors to submit technical and cost proposals. Offerors were instructed to provide a cumulative cost proposal for the entire 5-year contract period and a separate cost proposal for each year of the contract. The contract was to be awarded to the offeror whose proposal was most advantageous to the government with technical quality more important than cost unless the technical quality of the proposals was approximately equal, in which case cost would become the determining factor in the award decision.

Two offerors, ES and CDM, responded to the solicitation. After the technical and cost proposals were evaluated, both proposals were included in the competitive range. The firms were invited to participate in face-to-face discussions at which they were presented with questions concerning their cost and technical proposals. Specifically, CDM was told that it had proposed too few technical assistance trips and that its level of effort for consultants was low.

Both offerors submitted best and final offers (BAFO) by the August 24 due date. The technical proposals were considered equal. CDM's cost proposal was lower than the cost proposal submitted by ES. In reviewing CDM's cost proposal, the

project officer found that the number of technical assistance trips and the number of direct-labor hours that CDM proposed were too low. The contracting officer reviewed the project officer's analysis and determined that CDM was not proposing a sufficient number of trips and sufficient costs because the solicitation was ambiguous. As a result, the contracting officer reopened negotiations and explained to CDM why its costs for certain tasks were too low. Subsequently, both offerors were requested to and did submit revised BAFOs.

While ES's revised BAFO appeared lower in cost than CDM's revised BAFO, the contracting officer found that in its second BAFO, ES had excluded its proposed subcontractor costs from its total proposed cost. During a meeting at HHS offices concerning another solicitation, the contracting officer pointed this out to ES on September 19.[1] ES agreed with the contracting officer that it had failed to include its proposed subcontractor costs in its total proposed costs. ES also asserted that [deleted]. Based on the contracting officer's instructions, the next day, ES submitted a revised BAFO in which it included its proposed subcontractor costs in its total proposed cost. ES also eliminated certain proposed costs from the [deleted]. In calculating ES's total cost, the contracting officer considered the addition of the subcontractor costs to the total proposed cost. However, the contracting officer did not accept the revisions that resulted from [deleted]. If both corrections were considered, ES's proposal was low. With only the addition of the subcontractor costs considered, CDM's proposal is low. Since the proposals were technically equal, the contracting officer awarded the contract to CDM on the basis of CDM's lower cost. This protest followed.

TECHNICAL LEVELING

ES first protests that the agency's decision to reopen discussions with and request a second BAFO from CDM constituted technical leveling which is prohibited by Federal Acquisition Regulation (FAR) § 15.610(d). Technical leveling is defined as, "helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out

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[1]ES states that the meeting took place on September 18. September 18, however, is a Sunday. Since it is unlikely that this meeting took place on a Sunday since from the protest it is evident that many people were present at the agency, we have assumed that the meeting took place on September 19.

weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal." Id. ES argues that in this case, the agency reopened discussions for CDM to revisit the areas identified as deficiencies in the initial discussions and thereby engaged in technical leveling. Specifically, ES argues that by reopening discussions to tell CDM that its proposal did not include sufficient technical assistance trips and costs for tasks 3 through 8 and sufficient costs for tasks 13 and 14, HHS engaged in technical leveling with CDM. ES also argues that following the first round of BAFOs, ES's proposal was reasonably priced and responsive to the requirements of the solicitation, so there was no reason to reopen discussions.[2]

HHS responds that it reopened discussions because the solicitation requirements for tasks 3, 13, and 14 were unclear. Specifically, HHS asserts that CDM proposed too few trips because it was not clear from the solicitation that the technical assistance trips required by task 3 were for tasks 3 through 8 alone and that additional trips would be needed in connection with other tasks. Similarly, the agency points out that the solicitation did not state that the task 13 and 14 requirements were yearly requirements and CDM interpreted these tasks as dictating requirements for the entire 5-year contract period. HHS explains that while it pointed out to CDM that its proposed trips and labor were too low in the first round of discussions, it did not inform CDM that its proposal failed to comply with the requirements of the solicitation. The agency asserts that it was only after CDM continued to interpret the solicitation in a way

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[2]ES also argues that by reopening discussions, HHS improperly engaged in auction techniques. Auction techniques include indicating to an offeror a cost that it must meet to obtain further consideration, advising an offeror of its relative cost standing, and furnishing information about other offerors' prices. FAR § 15.610(e). To support its allegation, ES speculates that the agency advised CDM of its cost standing and provided CDM with information concerning ES's costs. In its report, the agency denied providing such information to CDM. The agency also pointed out that CDM raised rather than lowered its proposed cost in response to the reopened discussions. Although in its response to the report ES continues to argue that by reopening discussions the agency used auction techniques, ES does not attempt to refute the agency's statement that it did not provide cost information to CDM regarding its standing or ES's costs, and there is no information in the record to suggest that the agency did so. Thus, we see no merit to this argument.

other than the agency intended that it concluded that the requirements were not clear.

ES argues that despite the fact that the agency pointed out to CDM during the first round of discussions that CDM had understated the required number of technical assistance trips, consultant days, and direct labor required to perform the contract, CDM submitted a BAFO that did not propose an adequate number of travel days and labor hours to perform the contract. ES therefore reasons that there was no legitimate reason for the agency to reopen discussions with CDM regarding these issues, but instead, doing so merely gave CDM another chance to bring its proposal up to the level of ES's proposal.

ES also disputes the agency's assertion that the solicitation was unclear. Task 3 required offerors to provide "up to 704 days of technical assistance and 305 trips to alcohol and other drug abuse treatment programs." Before initial proposals were due, CDM asked if 305 trips was for tasks 3 through 8 only or for all tasks in the solicitation. HHS answered the question in amendment No. 2, stating that "305 trips is the number of consultant travel trips." CDM interpreted this to mean that 305 trips were required for all tasks, rather than for tasks 3 through 8 alone, and therefore proposed fewer than 305 trips for those tasks. During the initial discussions, HHS generally informed CDM that it had proposed too few technical assistance trips. In its first BAFO, CDM still proposed too few trips. As a result, during the reopened discussions, the contracting agency informed CDM that it was required to propose 305 trips for tasks 3 through 8. ES asserts that since CDM should have already known this from the response to its question in amendment No. 2, the agency's decision to give CDM the opportunity to again correct its proposal was technical leveling.

With respect to tasks 13 and 14, ES asserts that the solicitation clearly indicated that the stated requirements were yearly requirements and thus that offerors were required to propose yearly costs for these tasks. To support this position, ES points to the following language in the solicitation: "[a] cost reimbursement, completion-type contract is contemplated for a period of five (5) years," and "submit separate cost proposals for each year of the proposed contract." According to ES, this language indicates that the stated requirements are yearly requirements. ES also points out that tasks 13 and 14 clearly indicate that they would be performed in future years. ES thus argues that to the extent during the second round of discussions that the agency told CDM that the tasks were to be performed yearly, HHS gave CDM explicit

instructions on how to improve its proposal and engaged in technical leveling.

A contracting agency may reopen discussions after receipt of BAFOs when "it is clear that information available . . . is inadequate to reasonably justify contractor selection and award based on the [BAFOs] received." FAR § 15.611(c). In fact, where a procuring agency determines that a solicitation is unclear, the agency may, and should, reopen discussions and permit offerors to revise their proposals based on clarified requirements. Quintron Sys., Inc., B-249763, Dec. 16, 1992, 92-2 CPD ¶ 421. The contracting agency's action in doing so is not technical leveling. Id.

Here, in reopening discussions, HHS did not engage in technical leveling because the solicitation was unclear concerning the requirements of tasks 3, 13, and 14. In this respect, we agree with the agency that the solicitation was unclear regarding whether 305 was the number of trips that the offeror had to propose for tasks 3 through 8 or the total number of trips for all tasks in the contract. Task 3 of the solicitation stated that the contractor shall provide "up to 704 total days of technical assistance and 305 trips to alcohol and other drug abuse treatment programs." The agency's intention was to indicate that offerors were expected to propose 305 trips for tasks 3 through 8. Nevertheless, this was not clear to CDM, which asked HHS whether the 305 trips were for tasks 3 through 8, or all tasks on the contract. The agency answered, "305 is the number of consultant travel trips." We believe that since consultant travel trips were required for tasks other than tasks 3 through 8, such as, for example, task 14, the agency's response to CDM's question did not clarify the solicitation and, based on that response, CDM reasonably concluded that it could propose fewer than 305 trips for just tasks 3 through 8. Since HHS expected offerors to propose 305 trips for tasks 3 through 8, when it became clear that, due to the solicitation, CDM was not proposing on this basis, HHS appropriately concluded that it should reopen negotiations.

The agency also reasonably concluded that tasks 13 and 14 were unclear. Task 13 provides: "CONDUCT PRE-AWARD SITE VISITS . . . the Contractor shall conduct up to 18 pre-award site visits on applications for future fiscal year cooperative agreement awards," and task 14 provides: "JAIL TREATMENT PLANNING. . . . The Contractor shall provide a consultant for each Target City program for one on-site consultation." Thus, neither task indicated that the stated requirements were for each of the 5 years of the contract or for the entire 5-year contract period. Nor did any other provision in the solicitation indicate that tasks 13 and 14 stated yearly requirements. Accordingly, we do not think

that CDM unreasonably interpreted these tasks as stating requirements for the entire 5-year term of the contract, despite ES's argument that CDM should have known that they were yearly based on the solicitation language requiring offerors to submit a proposal for each year of performance. Also, while we agree with ES that the solicitation contemplates that both tasks 13 and 14, and all other tasks, will be performed in future fiscal years, this does not mean that those tasks are stated as yearly requirements as opposed to requirements that will be performed over the life of the contract.

MISTAKE

While reviewing ES's second BAFO, the contracting officer noticed that ES's total proposed cost did not include its subcontractor costs. The contracting officer believed that this was an apparent and inadvertent error and, on September 19, pointed the error out to a representative of ES. ES agreed with the contracting officer that it had omitted subcontractor costs from its proposed total cost. ES's representative also stated that ES had (deleted). The following day, ES submitted a corrected proposal in which it included its proposed subcontractor costs in its total proposed cost. ES also revised its cost proposal so that its (deleted). In determining ES's cost, the contracting officer considered ES's cost proposal with the addition of the subcontractor costs. He did not, however, consider ES's proposed change in the (deleted) because he concluded that such a revision was the result of an alleged mistake that was not apparent from the face of the offer and the solicitation and thus could only be corrected by reopening discussions with all offerors, an action he did not take. ES's proposal was low before any corrections were made and would remain low if both corrections were permitted. However, with only the addition of subcontractor costs to ES's total proposed costs, ES's proposal was no longer low.

ES protests that the contracting officer failed to follow applicable regulations concerning the alleged mistakes. Specifically, with regard to the correction of the omitted subcontractor costs, ES asserts that under FAR § 15.607(c)(1), where a contracting officer suspects that there is a mistake in an offeror's proposal, he must point out the suspected mistake and request the offeror to verify its proposal. ES asserts that the contracting officer did not give ES a chance to verify its proposal, but instead, demanded that ES correct it. ES further argues that under FAR § 15.607(c)(3), the authority to correct a mistake rests with the head of the contracting agency, the decision must be in writing, and it must be reviewed by legal authority. ES asserts that these FAR provisions were not followed and

thus that the contracting officer did not have authority to correct the mistake.

ES's contention that the contracting agency improperly demanded that ES correct its proposal rather than request that ES verify it is untimely. Under our Bid Protest Regulations, a protest based on other than an apparent solicitation impropriety must be filed within 10 working days after the protester knew or should have known the basis of protest. 4 C.F.R. § 21.2(a)(2) (1994). Here, the meeting at which the contracting officer allegedly demanded that ES verify its offer took place on September 19. ES therefore was required to protest no later than October 3, 10 working days later. Since ES did not protest until October 19, this allegation is untimely.

With respect to ES's argument[3] that the authority to correct a mistake rests with the head of the contracting activity, FAR 15.607(a) gives the contracting officer the responsibility to examine all proposals for minor informalities or irregularities and apparent clerical mistakes and to resolve such matters. The contracting officer has stated, and ES has not disputed, that the omission of the subcontractor costs was a clerical error that was apparent from the face of the ES proposal. Thus, contrary to ES's position, the contracting officer had the

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[3]We discuss the remaining aspects of the protest under the FAR mistake rules because HHS proceeded on that basis and both parties raised only mistake-related arguments during the course of this protest. Since, however, a cost reimbursement contract is involved here, this "mistake" aspect more appropriately should have been addressed in the agency's cost-realism analysis of ES's proposal. Where, as here, the solicitation contemplates the award of a cost reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.609(d). Consequently, a cost-realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc.-Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Thus, for example, when the contracting officer realized that ES had failed to include its subcontractor costs in its proposed total cost, the contracting officer, instead of bringing the matter to ES's attention as a mistake and giving ES an opportunity to correct it, could have simply adjusted the cost realism assessment of performance by ES by adding the subcontractor costs onto ES's proposed cost.

authority to resolve the issue of the omitted subcontractor costs with ES. FAR § 15.607(a).

ES also asserts that the contracting officer improperly rejected ES's corrected [deleted]. ES asserts that during the meeting where the contracting officer pointed out the firm's error, ES's representative told the contracting officer that he believed that ES had [deleted] and that ES intended to correct that error. ES argues that even if the contracting officer did not understand at that time that ES intended to [deleted], once the contracting officer received ES's BAFO with the corrected [deleted], the contracting officer was on notice of the intended correction. ES asserts that since the contracting officer did not intend to reopen discussions, at that point the contracting officer was required to resolve the alleged mistake in accordance with FAR § 15.607(c), which prescribes the procedures to follow where a mistake is alleged before award and the contracting officer does not intend to hold discussions. ES asserts that under this provision, once the contracting officer was on notice of ES's alleged mistake in the application of its G&A rates, it was obligated under FAR § 15.607(c)(3) to permit ES to request permission from the head of the contracting agency to correct the mistake.

The agency asserts that the alleged [deleted] was not an apparent clerical error since there was no indication from the face of the solicitation and ES's proposal that ES had made a [deleted]. The agency therefore reasons that in order for ES to correct this alleged mistake, the agency would have had to reopen discussions. The agency argues that since it did not reopen discussions, there was no way for ES to correct the mistake. The agency also argues that it had no obligation to reopen discussions to permit ES to correct the alleged mistake.

FAR § 15.607(a) directs contracting officers to examine proposals for minor informalities and irregularities and apparent clerical mistakes and provides that such mistakes can be corrected through clarifications, rather than discussions. FAR § 14.405, referenced in FAR § 15.607(a) explains that minor informalities or irregularities are matters of form and not substance. The thrust of the regulation is that correction of a mistake, without holding discussions with all offerors, is appropriate only where the existence of the mistake and the proposal actually intended can be clearly and convincingly established from the RFP and the proposal itself. Pulau Elecs. Corp., B-254443, Dec. 17, 1993, 93-2 CPD ¶ 326. Here, there was no indication in ES's proposal and the RFP that ES had made a mistake in [deleted]. Therefore, the alleged mistake could be corrected only through discussions.

Moreover, the agency was not obligated to reopen discussions in order to permit ES to correct the mistake. ES correctly points out that FAR § 15.611(c) directs procuring agencies not to reopen discussions after the submission of BAFOs unless reopening discussions is clearly in the best interest of the government. The decision whether to reopen discussions is largely a matter of contracting officer discretion; our review of assertions that a contracting officer abused his or her discretion by not reopening discussions focuses on whether further negotiations would prove sufficiently advantageous to the government to justify reopening discussions. Pulau Elecs. Corp., supra. Here, in its comments on this issue, ES itself states "there appears to be no basis (and none is offered by HHS) for asserting that the government's best interest would have been served by a third BAFO request." Nor do we see that it would have been in the government's best interest to reopen negotiations. While ES asserts there was a mistake in its proposal in the [deleted], there was nothing in the proposal to indicate such a mistake. Therefore, there was no perceived benefit to the agency in reopening discussions and further delaying the procurement.

The protest is denied.

Robert P. Murphy
General Counsel